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No. 94-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

As noted in Southwestern Bell's petition, the parties to the proceedings below were Southwestern Bell Telephone Company and the Oklahoma Corporation Commission.

The Oklahoma Attorney General now claims, however, that "the Attorney General [enjoyed] the status of party in the case below," *see Brief in Opposition for the State of Oklahoma* at ii.

For the record, neither the State of Oklahoma nor the office of the Attorney General were named in Southwestern Bell's complaint; nor were either of these entities ever granted intervenor status. According to the docket sheet of the Oklahoma Supreme Court, the parties to the proceeding were "Southwestern Bell Telephone Company" and "Corporation Commission." Nor is it apparent how the Oklahoma law on which the Attorney General exclusively relies supports its contention. Nevertheless, Southwestern Bell has no objection to the Attorney General's participation in the proceedings before this Court.

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BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

INTRODUCTION

The Briefs in opposition, and those of the various *amici curiae*, buttress Southwestern Bell's suggestion that this is a case of unusual practical and doctrinal importance. All of these briefs—including those offered ostensibly "in opposition"—serve to confirm SWB's original contention: This Court should grant certiorari to untangle a vital area of due process analysis.

The issues now are sharply, cleanly joined. On one side stand the nation's state utility regulators, as represented by the Oklahoma Corporation Commission, the State of Oklahoma, and the National Association of Regulatory Utility

Commissioners—the "quasi-governmental" entity that is "the national organization of the State commissions." *See Brief of the National Association of Regulatory Utility Commissioners as Amicus Curiae in Support of Respondent* at 1 ("*NARUC Br.*"); *see also Brief in Opposition for the Oklahoma Corporation Commission* ("*Commission Br.*"); *Brief in Opposition for the State of Oklahoma* ("*State Br.*"). These parties defend the grudging reading of the Due Process Clause adopted below, no doubt sensing that denial of Southwestern Bell's petition would mark a significant step toward freeing regulators from the traditional bounds of due process.

Opposite the regulators stand representatives from the nation's utilities, utility consumers, and the academic community, united in a broad coalition seeking review and reversal of the decision below. *See Brief of Amicus Curiae Public Citizen, Inc. in Support of Certiorari* ("*Public Citizen Br.*"); *Brief of Amicus, Professor Bernard Schwartz, in Support of the Petition for Writ of Certiorari* ("*Schwartz Br.*"); *Brief of Amici Curiae, Pacific Bell, Nevada Bell, BellSouth Corporation, and GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies, in Support of the Position of Petitioner* ("*Utility Br.*"). These parties have concluded that this Court's intervention is required to protect the constitutional rights of consumers, *see Public Citizen Br.* at 5, the constitutional rights of utilities, *see Utility Br.* at 4-7, and the integrity of this Court's due process jurisprudence, *see Schwartz Brief* at 2 ("The Oklahoma Supreme Court's decision . . . violates basic constitutional and administrative law principles."). Whatever the merits of the respective positions of these opposing camps, one overriding point is manifest: There is today a fundamental, nationwide disagreement between state regulators and those they regulate over the meaning of the Due Process Clause.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHEN THE TEST ANNOUNCED IN *MATHEWS v. ELDRIDGE* APPLIES.

No doubt aware that the Oklahoma court's opinion is vulnerable on its own terms, NARUC attempts to shift the basis of the decision to this Court's analysis in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a case not mentioned below. *See NARUC Br.* at 9-16. NARUC argues that the Oklahoma decision may be upheld under *Mathews*, thus contradicting Public Citizen, which concludes, after a more thoughtful analysis, that the Oklahoma Supreme Court's decision is "inconsistent" with *Mathews*. *Public Citizen Br.* at 12.

Whether the decision below is defensible under *Mathews* and whether *Mathews* now governs due process claims in the utility ratemaking context are themselves issues worthy of this Court's consideration. The *Mathews* test was originally deployed to determine the process due to claimants of the "new property." *See* Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural rights in connection with termination of welfare benefits); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of social security benefits); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of public employment); *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) (termination of government-protected private employment). *Mathews* has also been found helpful in analyzing various other, non-traditional, procedural due process claims. *See Ingraham v. Wright*, 430 U.S. 651 (1977) (student's right to due process before corporal punishment at the hands of school officials); *Lassiter v. Department of Social Servs.*, 452 U.S. 19 (1981) (indigent parent's right to counsel in child custody proceedings).

In many instances, however, it is difficult to predict whether a *Mathews* analysis will be employed. This Court has

applied *Mathews* to the claim that due process requires prior notice and a hearing before prejudgment attachment of real estate. *See Connecticut v. Doehr*, 501 U.S. 1 (1991). But it has failed to apply *Mathews* to the claim that due process requires actual notice before extinguishment of creditors' rights. *See Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 487 (1988). The Court has held that "the traditions and conscience of our people," not *Mathews*, determine what process is due in criminal cases. *Medina v. California*, 112 S. Ct. 2572, 2577 (1992) (internal citations omitted). But it has similarly declined, over a dissent, to apply *Mathews* to a due process claim arising in a civil context. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (relying on "consistent" common-law history to uphold award of punitive damages); *id.* at 54-58 (O'Connor, J., dissenting) (invoking *Mathews* to find the award unconstitutional).

Undoubtedly, two general approaches to procedural due process now compete for primacy in this Court's jurisprudence—one based on tradition, history, and precedent, the other on *Mathews* interest balancing. This case affords a useful vehicle for the Court to clarify the circumstances in which each approach should apply.

II. THE BRIEFS IN OPPOSITION NEITHER REHABILITATE THE DECISION BELOW NOR UNDERMINE SOUTHWESTERN BELL'S ARGUMENTS IN FAVOR OF CERTIORARI.

While the briefs in opposition provide additional reasons for granting certiorari, they do nothing to undermine the reasoning of Southwestern Bell's petition.

First, the striking feature of the 67 pages of briefing offered in opposition is what they do *not* contain—namely, citations to any precedent of this Court holding that, for purposes of due process analysis, ratemaking proceedings are "legislative," hence deserving of the second-class status accorded them below. The Oklahoma Supreme Court's ruling

was founded on the misguided notion that ratemaking proceedings are entitled to little or no due process protection because they are invariably "legislative." *See Petition* at 8-11. The court reached this conclusion by ignoring this Court's due process cases entirely and, instead, misapplying statutory and abstention precedents to Southwestern Bell's claim. *Id.* Significantly, the briefs in opposition do nothing to shore up these weaknesses in that decision; rather, they simply recycle the inapposite authority invoked below. *See Petition* at 10 & n.2 (listing inapposite cases relied on below); *Commission Br.* at 14 (citing these cases); *State Br.* at 19 (same).

Second, the assaults on Southwestern Bell's due process analysis are similarly unconvincing. The State would dismiss (as "dicta") the understanding of this Court's *Londoner/Bi-Metallic* line of due process precedent summarized in *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973), and would pretend that the Court's decision in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), turned on a factor (the prospectivity of the relevant tax assessments) that did not figure anywhere in the Court's analysis. *See State Br.* at 22-23. The Corporation Commission would have the Court believe that the *Londoner/Bi-Metallic* precedents apply only to the due process right to a hearing, but do not apply (who knows why?) to the right to an unbiased adjudicator. *Commission Br.* at 17. In addition, the State mischaracterizes Southwestern Bell's position. *Compare State Br.* at 17 (arguing that Southwestern Bell "assert[s]" that this Court has not recognized "that the distinction between judicial and legislative functions is an element of due process analysis") *with Petition* at 9 (arguing that "[t]he Oklahoma Court correctly assumed that the rigid requirements designed for officials performing judicial or quasi-judicial functions are not applicable to those acting in 'legislative' capacities") (quotation marks and citations omitted). These "arguments" are just slippery attempts to avoid or explain away this Court's due process jurisprudence.

Third, the efforts to cast doubt on Southwestern Bell's treatment of the various State cases are also unpersuasive. In particular, the Commission argues that *Business and Professional People for the Public Interest v. Barnich*, 614 N.E. 2d 341 (Ill. App. Ct. 1993), cited by SWB, was decided strictly under the "state Administrative Procedure Act," *Commission Br.* at 20, while the State speculates that various cases relied on by Southwestern Bell may have been decided purely on state-law grounds. *State Br.* at 23-24.

In fact, our adversaries have identified no cases in which Southwestern Bell has mislabeled a state-law decision as a due process precedent. *Barnich*, the one decision named by the opponents, is a case in point. There, the court's ruling, while based secondarily on statutory grounds, was based primarily on grounds that "[t]he *principle of jurisprudence* that one with a personal interest in the subject matter of decision in a case may not act as judge in that case is applicable not just to judges but [also] to . . .commissioners." *Barnich*, 614 N.E. 2d at 345 (emphasis added). This "principle," on which the court primarily relied, is rooted in the Due Process Clause.

III. THE CORPORATION COMMISSION'S ARGUMENT THAT THE PROCEEDINGS BELOW ARE NOT YET FINAL AND THE STATE'S ARGUMENT THAT APPELLATE REVIEW IS AN APPROPRIATE REMEDY FOR BIAS ARE MERITLESS.

Just as NARUC distances itself from the Oklahoma court's reasoning by relying on *Mathews v. Eldridge*, so too the lead arguments of the Corporation Commission and State allow each of them to avoid having squarely to defend the decision below. Although these arguments are decidedly off-base, a somewhat detailed reply to each is required.

First, the Commission's elaborate finality smokescreen requires a brief excursion into both the procedural history of the case and this Court's finality jurisprudence. *See Commission*

Br. at 7-13; *State Br.* at 10-11; *NARUC Br.* at 6-8. The case below, No. 80,579 in the Oklahoma Supreme Court, was an "original proceeding" brought by Southwestern Bell seeking a writ of prohibition "disqualifying Corporation Commissioner Anthony . . . from further participation in Corporation Commission proceeding PUD-260, a rate hearing, as well as in all pending and future SWB cases." *See* Pet. App. at 2a (first sentence of decision below). In response to this petition, the Oklahoma Supreme Court ordered, "ORIGINAL JURISDICTION ASSUMED. PETITION FOR WRIT OF PROHIBITION DENIED. . . ." *See* Pet. App. at 18a (final sentences of decision below).

Because the Oklahoma Supreme Court agreed to "assume" "original jurisdiction" of Southwestern Bell's petition—that is, to treat it as distinct from any appeal of the Corporation Commission's actions in PUD-260 and the other "pending and future" rate cases from which Commissioner Anthony's disqualification was sought—the relevant proceeding for determining finality is case no. 80,579. As to that proceeding, the Oklahoma Supreme Court has issued a "final judgment," *see* 28 U.S.C. § 1257(a), definitively denying Southwestern Bell's request as to both pending and future cases. The Court did not retain jurisdiction over any part of the case; nor remand any issue to a court; nor remand any issue to the Corporation Commission.

To its credit, the Corporation Commission admits that its finality argument contradicts a venerable line of cases holding that writ of prohibition proceedings are stand-alone actions for purposes of determining finality. *See Commission Br.* at 12; *see also, e.g, Madruga v. Superior Court of California*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Bandini Petroleum Co. v. Superior Court of California*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the

meaning of [the predecessor of 28 U.S.C. 1257]."); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 565 (1947) ("The effect of the California Supreme Court's judgment, of course, will be to permit further proceedings by the Municipal Court. But under the rule of *Bandini Petroleum Co. v. Superior Court* . . ., this prohibition proceeding would be an independent suit . . . and the judgment finally disposing of it . . . is a final judgment within the meaning of [the predecessor of 28 U.S.C. 1257]."); *cf. Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-91 (1980) (Court reviews Oklahoma Supreme Court decision denying writ of prohibition without mentioning possibility that decision is not final).

The Commission attempts to avoid application of these precedents, however, by arguing that "[i]n all of those cases, prohibition was sought as a means of challenging the jurisdiction of a lower court," whereas "SWB's petition to the state court for writ of prohibition was in the nature of a motion to recuse." *Commission Br.* at 12. This attempted distinction is specious. Whether a rejected prohibition petition seeks to enjoin an ongoing proceeding altogether or to enjoin only the participation of one particular adjudicator is plainly irrelevant to finality analysis. Moreover, the attempted distinction is also inaccurate. *Bandini Petroleum*, the leading case, involved claims that, while necessarily phrased in jurisdictional terms, *see Black's Law Dictionary* at 1091 (5th ed. 1979) ("Prohibition is that process by which a superior court prevents an inferior court . . . *from exceeding its jurisdiction*) (emphasis added), were "in substance" a contention exactly like Southwestern Bell's—that a regulatory practice "violated the due process clause of the Fourteenth Amendment." 284 U.S. at 13. All the blather about whether this case falls within some finality exception recognized by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *see Commission Br.* at 7-10, is therefore beside the point. This case has no need for finality exceptions; it falls squarely within the finality rule.

Second, the case for granting review is similarly undiminished by the principal argument of the State of Oklahoma—the incredible contention that "[t]he Oklahoma Supreme Court" has not yet "ruled on Bell's claim of bias," *State Br.* at 11, or "whether Commissioner Anthony[']s participation in the PUD 260 remand violates constitutional due process," *id.* at 10; *see generally id.* at 10-16. In presenting this argument, the State amalgamates two distinct contentions: a disingenuous claim that the Oklahoma court did not reach the merits of SWB's disqualification request and an erroneous claim that appellate review, not disqualification, can be an appropriate remedy for bias.

The State insinuates that the Oklahoma court did not deny Southwestern Bell's petition, but simply deferred action on it pending the development of a more complete record before the Corporation Commission. *See, e.g, State Br.* at 12-14. In fact, the court, as the State well knows, framed the issue as whether "judicial standards" of impartiality should apply to PUD-260, a ratemaking proceeding. Pet. App. at 6a. It held that because the PUD-260 proceeding was "legislative," the judicial standards which otherwise would have compelled Commissioner Anthony's disqualification (as the court had held initially) did not apply. *Id.* at 6a, 9a-10a.

To be sure, the court attempted to justify its questionable decision by giving assurances that if "SWB believes that [the remand] proceedings were so unfair because of Anthony's prejudice that the resulting rate order is unreasonable and confiscatory, it would be in a position to assert bias as a ground for reversal of the rate order." *Id.* at 12a-13a. But these statements were given as reasons why the court's result was not unreasonable; not as the specification of some novel remedy for unconstitutional bias. The court itself never claimed, as the State does now, that appellate review can substitute for the disqualification of a biased decisionmaker. *Cf. Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2277 (1993) ("Even appeal and a trial

de novo will not cure a failure to provide a neutral and detached adjudicator"); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) ("Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge *in the first instance*.") (emphasis added).[1]

CONCLUSION

Southwestern Bell's petition for certiorari should be granted.

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[1] Our opponents offer additional arguments not canvassed here, all of which are meritless, beside the point, or supportive of the need for this Court's review. *See, e.g., Commission Br.* at 13 (arguing that the "Oklahoma Supreme Court's discussion of the rule of necessity" is "merely advisory"); *id.* at 19-21 (arguing that the decision may be upheld under a different due process standard than that applied below); *id.* at 22-25 (arguing that the decision may represent harmless error).

Southwestern Bell will respond, however, to the State's attempt to prejudice this Court by casting Southwestern Bell as the villain (and Commissioner Anthony as the hero) of this drama. In particular, the State would characterize Commissioner Anthony as a mere "witness," who has "cooperated" with the FBI. That characterization, while not false, is misleading, because it seriously understates the role Commissioner Anthony played in the events at issue. From late 1988 until October 1992, Commissioner Anthony devoted a substantial amount of time to, and was an active decisionmaker in, an ongoing investigation directed, at least in part, at Southwestern Bell. Without informing the Oklahoma Attorney General, the Commission's legal staff, or his fellow Commissioners, Commissioner Anthony secretly tape-recorded dozens of conversations involving Southwestern Bell employees and counsel. For four years, then, Commissioner Anthony attempted to perform simultaneously the dual and conflicting roles of neutral and detached arbiter and active undercover agent. At no time during this extended period, did he inform Southwestern Bell's executive management of his investigation. Rather he waited until a few weeks before his 1992 congressional election to disclose that he had been "cooperating" with the FBI in this manner throughout his entire tenure at the Commission.

Respectfully submitted,

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